Office - Supreme Court, U.S.
FILED
JUN 3 1982
ALEXANDER L. STEVAS,
CLERK

81 No. 2315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

IRVING B. BUSHLOW
Counsel of Record for Petitioner
26 Court Street
Brooklyn, New York 11242
(212) MA 5-1336

MORRIS CIZNER
160 Broadway
New York, New York 10038
(212) 227-1350

* The Appendix to the Petition forms a separate volume, which is being submitted with the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Where a longshoreman who is injured while at work on board a vessel, due to the negligence of the shipowner, fails to bring an action for damages against the shipowner within the time prescribed by statute for doing so (Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 933(b)(the "Act"*), with the result that all right of the longshoreman to recover damages against the shipowner is automatically assigned to the employer (33 U.S.C., section 933(b)), or to the latter's compensation insurance carrier, by subrogation, if the carrier has paid the compensation benefits (33 U.S.C.,

---

*that is, within six (6) months after accepting compensation under an award in a compensation order made by a deputy commissioner of the United States Department of Labor Compensation Board

section 933(h)), but notwithstanding said facts and law the longshoreman, after the expiration of said 6-month period, does bring such an action against the shipowner, may the employer's compensation insurance carrier, who has paid the compensation benefits, effectively ratify the commencement of the action, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure?*

2. Where the carrier referred to in "(1)" above, at the time of ratifying the commencement of the action, also agrees that it will not bring a separate

*If the carrier may effectively ratify the action, pursuant to Rule 17(a), the action will be deemed to have been commenced by the carrier, as the real party in interest, and thereafter prosecuted for its benefit (Rule 17(a)), subject, however, if there is a recovery, to the provisions of 33 U.S.C., section 933(e), governing the distribution of the proceeds of the recovery.

action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by the longshoreman with its approval, in which agreement the longshoreman joins, the carrier exacting, in return, with the longshoreman's consent, a lien and "credit rights" (sic) on the proceeds of any recovery by way of judgment or settlement, for the compensation benefits it has paid, are said additional facts essential in order to render the ratification effective?

2a. If the facts recited in "(2)" above are essential in order to render the ratification referred to in "(1)" and "(2)" above effective, do said facts indeed render the ratification effective?

3. Do the ratification and agreement between the carrier and the longshoreman described in "(1)", "(2)" and "(2a)" above, whereby the carrier, inter alia, is given a lien on the proceeds of any recovery, for the amount of compensation benefits it has paid, effect a waiver by them of their right to have the proceeds of any recovery distributed in accordance with the provisions of 33 U.S.C., section 933(e), insofar as said statute relates to their shares?

3a. Do the ratification and agreement referred to in "(1)" - "(3)" inclusive, above, effectively permit the carrier and longshoreman to distribute, in accordance with said agreement, what would otherwise be their shares under 33 U.S.C., section 933(e)?

4. If the carrier referred to in "(1)" through "(3)" above, at the time of ratifying the commencement of the action, which was brought in a federal district court, relies, in ratifying the action, upon a holding by the court of appeals for the circuit in which the action was brought, handed down in a case in which the pertinent material facts are identical to the pertinent material facts in the action brought by the longshoreman, referred to in "(1)" through "(3)" above, the holding being to the effect that had the statutory assignee of the longshoreman's cause of action against the shipowner, brought after the expiration of the 6-month period prescribed for bringing such action, ratified the commencement of the action, pursuant to Rule 17(a), that fact would have effectively conferred standing upon the longshore-

man to main the action*, and that holding was essential to, and an integral part of the decision in that case, does the ratification by the carrier referred to above herein, in reliance upon said holding, effectively confer standing upon the longshoreman to maintain the action?

5. Did the Court of Appeals below in (a) unexpectedly overruling, in this case, albeit sub silentio, its holding in Rodriguez v. Compass Shipping Co., supra, 617 F. 2d 955, 958, described in "(4)" above, and (b) applying the overruling to and in the case at bar retroactively, as it did, deny to the carrier and long-

*Rodriguez v. Compass Shipping Co., supra (2 Cir., March 19, 1980), 617 F. 2d 955, 958 (at "(2)", aff'd. on other grounds, _____ U.S. _____, 101 S. Ct. 1945. The ratification by the carrier in the case at bar, in reliance upon Rodriguez, supra, took place on May 12, 1981, fourteen (14) months after the Rodriguez decision.

shoreman the due process rights - that is, notice of, and opportunity to be heard in opposition to, the retroactive application of the overruling - guaranteed by the Fifth Amendment to the Constitution of the United States?

6. Where the carrier referred to in "(1)" through "(5)" above, at the time of ratifying the commencement of the action, also agrees that if its ratification "is sufficient to preserve to" the longshoreman "ownership of the cause of action", it will not institute a separate action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by the longshoreman with its approval,

with the carrier, however, having a lien and credit rights for the compensation benefits it has paid, on the proceeds of any recovery in the action, by way of judgment or settlement, may the carrier, who, as subrogee of the employer, has exclusive control of the action (Rodriguez v. Compass Shipping Co., _____ U.S. _____, 101 S. Ct. 1945, 1955), be properly said not only to have ratified the commencement of the action, but also, at the same time, to have reassigned the cause of action against the shipowner to the longshoreman?

7. Did the Court of Appeals below, in failing to give effect to

(a) the carrier's ratification of the commencement of the longshoreman's action referred to in "(1)" to "(6)", inclusive, above, as well as the

carrier's reassignment to the longshoreman of the cause of action against the shipowner, referred to in "(6)" above, together with the carrier's concomitant agreement that it will not bring a separate action against the shipowner, but, instead, will be bound by any judgment in the action determining the issues of liability and amount of damages, if any, as well as by any release executed by the longshoreman with the carrier's approval, and the carrier's exaction, in return, for said ratification and reassignment, of a lien and "credit rights" (sic), in its favor, on any recovery in the action by way of judgment or settlement, for the compensation benefits it has paid, and

(b) the longshoreman's

agreement and consent to, and acceptance of, all the matters recited in "(a)" directly above,

did the Court of Appeals, in failing to give effect to all the foregoing, deny the carrier and the longshoreman the due process property rights guaranteed by the Fifth Amendment to the Constitution of the United States?

with the carrier's approval, and the carrier's agreement that, as consideration for its ratification and reassignment and concomitant agreement, set forth directly above, it will accept a lien and credit rights for the compensation benefit payments it has paid, which will attach to the proceeds of any recovery in the action by way of judgment or settlement, and (b) to the longshoreman's acceptance of said ratification and reassignment, as well as the carrier's concomitant agreement, set forth above, and its agreement to accept, as consideration, a lien and credit rights on the proceeds of any recovery in the action by way of judgment or settlement, for the compensation benefits it has paid - did the Court of Appeals, in failing to give effect to all the foregoing, deny the carrier and the longshoreman the due process guaranteed by the Fifth Amendment to the Constitution of the United States?

THE PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The names of the parties in the Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, are set forth in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
THE PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	x
OPINIONS BELOW	1
THE COURT'S JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS.	3
THE DATES AND TERMS OF THE ORDERS IN THIS COURT GRANTING EXTENSIONS OF TIME WITHIN WHICH TO PETITION FOR CERTIORARI	3
THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI . . .	4
STATUTORY PROVISIONS INVOLVED. . .	5
THE RULE OF THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVED. . .	5
STATEMENT OF THE CASE.	5
The initial proceedings.	5

TABLE OF CONTENTS
(Continued)

	Page
PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT ON THE GROUND THAT DEL RE HAD NO STANDING TO COMMENCE OR MAINTAIN THE ACTION	16
DEL RE'S OPPOSITION TO PRUDENTIAL'S RENEWED MOTION TO DISMISS, AND THE BASIS THEREOF: NAMELY, (1) THE LETTER FROM THE COMPENSATION CARRIER FOR DEL RE'S EMPLOYER, (a) RATIFYING THE COMMENCEMENT AND CONTINUATION OF THE ACTION, AND (b) REASSIGNING TO DEL RE THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DEL RE'S PERSONAL INJURY DAMAGES,* AND (2) DEL RE'S ACCEPTANCE OF THE RATIFICATION AND REASSIGNMENT, AND THE OTHER TERMS AND PROVISIONS**	17

* AND CONTAINING CERTAIN UNDERTAKINGS BY THE CARRIER, ETC.

**OF THE LETTER

TABLE OF CONTENTS
(Continued)

Page

THE DISTRICT COURT'S DENIAL, IN AN OPINION, OF PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT. 22

MOTTA V. RESOURCE SHIPPING AND ENTERPRISES CO. (D.C. S.D. N.Y., OCT. 1980; TENNEY, J.), 499 F. SUPP. 1365-1377, ONE OF THE CASES RELIED UPON BY JUDGE SAND IN THE DISTRICT COURT, INVOLVING THE SAME CARRIER AS IN THE CASE AT BAR, AND A LETTER OF RATIFICATION, ETC. VIRTUALLY IDENTICAL TO THE ONE IN THE CASE AT BAR 31

JUDGE SAND'S APPARENT CONCLUSION, ALBEIT SOMEWHAT ELLIPTICALLY AND OBLIQUELY EXPRESSED, THAT THE CARRIER'S LETTER IN THIS CASE ALSO AMOUNTED TO A REASSIGNMENT BY THE CARRIER TO DELRE OF THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DELRE'S PERSONAL INJURY DAMAGES 34

TABLE OF CONTENTS
(Continued)

Page

THE DISTRICT COURT'S AMENDED ORDER AND OPINION, PURSUANT TO 28 U.S.C., SECTION 1292(b), CERTIFYING THE QUESTION OF THE EFFECTIVENESS OF THE CARRIER'S RATIFICATION FOR INTERLOCUTORY REVIEW. 37

THE DECISION OF THE COURT OF APPEALS ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE, REVERSING THE DISTRICT COURT AND REMANDING WITH DIRECTIONS TO DISMISS THE COMPLAINT 38

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE 46

REASONS FOR GRANTING CERTIORARI 48

The extraordinary importance and unsettled nature of the basic questions presented for review 48

The conflict between the Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York 52

TABLE OF CONTENTS
(Continued)

Page

(a) The intra-circuit conflict in the Court of Appeals for the Second Circuit between the decision in this case and one of the holdings in Rodriquez v. Compass Shipping Co. (March 19, 1980), 617 F. 2d 95, 98 (at "(2)"), affd. on other grounds, _____ U.S. _____, 101 S Ct. 1945

(b) The reliance of the carrier and petitioner upon the holding in Rodriquez, supra 55

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CHEVRON OIL CO. V. HUSON, 404 U.S. 97, AND DENIES PETITIONER AND THE CARRIER THE DUE PROCESS DUE THEM UNDER THE FIFTH AMENDMENT 61

IN DECLINING TO GIVE EFFECT TO THE CARRIER'S RATIFICATION AND REASSIGNMENT, AND PETITIONER'S ACCEPTANCE OF SAME, THE COURT OF APPEALS DENIED PETITIONER AND THE CARRIER THE DUE PROCESS PROPERTY RIGHTS DUE THEM UNDER THE FIFTH AMENDMENT. . 63

TABLE OF CONTENTS
(Continued)

	Page
CONCLUSION	
Certiorari should be granted	65
APPENDIX OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES...	A-1

TABLE OF AUTHORITIES

	Page
Caldwell v. Ogden Sea Transport Inc. (4 Cir., 1980), 618 F. 2d 1037, 1047-1048 (at "IV")(20a, from last, but incomplete par.-21a).	35-36
Chevron Oil Co. v. Huson, 404 U.S. 97	61, 62
Clarkson Co. v. Rockwell Int'l. Corp., 441 F. Supp. 792, 797-98 (N.D. Cal. 1977)	44
De Luzio v. Trans-American Trailer, Inc., Supreme Court of the State of New York, County of New York, County Clerk's #12339/80 (Altman, J.)	54
Del Re v. Prudential Lines, Inc., 2 Cir., 1982 - 669 F. 2d 93, 95, rt. hd. col.. . . .	iii
de Vries v. Weinstein Int'l. Corp., 80 F.R.D. 452, 459 C.D. Minn. 1978.	44
Gibbes v. Zimmerman (1933), 290 U.S. 326, 332.	63, 65
James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (N.D. Miss. 1977).	44, 45

TABLE OF AUTHORITIES
(Continued)

	Page
Moore v. Hechinger, 75 U.S. App. D.C. 391, 127 F. 2d 746 (D.C. Cir. 1942)	27
Motta v. Resource Shipping & Enterprises Co., 499 F. Supp. 1365	31, 42-43, 50, 53, 54, 55, 59, 60
Mullaney v. Wilbur (1975) 421 U.S. 684, 690, note 10 .	62
Rodriguez v. Compass Shipping Co., 617 F. 2d 955, 958 (at "(2)"), affd. on other grounds _____ U.S. _____, 101 S Ct. 1945	v, vi, 18, 24, 25, 29, 32, 41-42, 43, 48, 55, 56, 57, 58, 59, 60, 61
People v. Hawkins (1898) 157 N.Y. 1, 7	64, 65
Sanderson v. City of Willmar (1968), 282 Minn. 5, 162 N.W.2nd 494, 497 (at "4")	64
Southern Nat'l. Bank of Houston v. Tri Financial Corp., 317 F. Supp. 1173, 1188 (S.D. Texas 1970) . . .	44

TABLE OF AUTHORITIES (Continued)

	Page
Sucino v. Akron Shipping Co., Supreme Court of the State of New York, County of New York, County Clerk's #13029/80 (Wallach, J.). . .	54
United Federation of Postal Clerks v. Watson, 133 U.S. App. D.C. 176, 184 & n. 34, 409 F. 2d 462, 470 & n. 34 (D.C. Cir.), cert. denied, 396 U.S. 902, 90 S. Ct. 212, 24 L. Ed. 2d 178 (1969). . .	27
United States v. Olivares-Vegas (2 Cir., 1974), 495 F. 2d 827, 829	42, 58
Yamamoto v. Omiya (9 Cir., 1977), 564 F. 2d 1319, 1325	41

Treatises

16A C.J.S., Constitutional Law, section 599(b), pp. 696-698	64

TABLE OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

	Page
Fifth Amendment to the Constitution of the United States.	63, 65, A-1
28 U.S.C., section 1332(a)(2)(3)(c)	47, A-2
33 U.S.C., section 904	A-3
33 U.S.C., section 905(b). . .	A-5
33 U.S.C., section 933	ii, iv, 5, 10, 18, 22, 26, 29, 48, 50, A-7
Rule 17(a) of the Federal Rules of Civil Procedure.	37, 57, A-11

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit which was delivered upon the rendering of the judgment sought to be reviewed is printed at pp. 1a-13a of the Appendix (which forms a separate volume), and is reported at 669 F. 2d 93.

The opinion of the United States District Court for the Southern District of New York which denied, without prejudice to renewal, the motion made by defendant Prudential Lines, Inc. (respondent in this Court) to dismiss the complaint, which opinion is reproduced at pp. 14a-18a of the Appendix, does not appear to have been reported.

The opinion of the United States District Court for the Southern District of New York denying on the merits the renewed

motion by the defendant Prudential Lines, Inc. (respondent in this Court) to dismiss the complaint, which opinion is reproduced at pp. 19a-23a of the Appendix, does not appear to have been reported.

The amended opinion and order (one paper) of the United States District Court for the Southern District of New York, certifying questions to the Court of Appeals, pursuant to 28 U.S.C., section 1292(b), in order to facilitate immediate interlocutory review, which opinion and order are reproduced at pp. 24a-25a of the Appendix, do not appear to have been reported.*

With respect to the compensation order made by a deputy commissioner of the United States Department of Labor Compensation Board, which awarded compensation to petitioner herein, which order is reproduced at pp. 27a-30a of the Appendix, no opinion was issued by the deputy commissioner.

*Neither the District Court, in certifying questions, nor the Court of Appeals, in granting leave to appeal (26a), wrote an opinion.

THE COURT'S JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS

The judgment of the Court of Appeals for the Second Circuit which is sought to be reviewed (reproduced at pp. 32a-33a of the Appendix) is dated January 21, 1982, and was entered the same day.

No rehearing was sought.

THE DATES AND TERMS OF THE ORDERS IN THIS COURT GRANTING EXTENSIONS OF TIME WITHIN WHICH TO PETITION FOR CERTIORARI

On April 13, 1982 Mr. Justice Marshall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including May 20, 1982.

On May 17, 1982 Mr. Justice Mar-

shall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including May 27, 1982.

On May 26, 1982 Mr. Justice Marshall, Associate Justice of this Court, signed an order extending the time for filing a petition for a writ of certiorari in this cause until and including June 3, 1982.

THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C., section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the construction of 33 U.S.C., sections 905(b) and 933(b) and (h).* These statutory provisions are set forth in Appendix "A" attached hereto.

THE RULE OF THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This case also involves the construction of Rule 17(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The initial proceedings

Petitioner Angelo Del Re was injured on May 7, 1975, while working as a longshoreman for Northeast Stevedores, Inc., on a ship owned by respondent Pru-

*Also, sections 904 and 933(e).

dential Lines, Inc. (27a*-28a, pars. "1"-"2"; 43a, second par., 59a, par. "19"; 64a, par. "9"; 4a, first par.). More particularly, Del Re, because of the ship's defective winches, was crushed by a draft which fell from said winches (43a, second par.).

As a result of the accident Del Re was unable to work for 29 weeks, and suffered permanent injury to his right arm and both of his legs (28a-29a, par. "5"; 4a, first par.).

Northeast's compensation insurance carrier, the State Insurance Fund, paid Del Re interim compensation during the period he was unable to work, and on

*Numbers, followed by the letter "a", unless otherwise indicated, refer to pages of the Appendix which forms a separate volume.

February 25, 1977 the Deputy Commissioner, Second Compensation District, of the United States Department of Labor, approved an award of $13,935.38, and filed an award to that effect incorporated in a compensation order (28a-29a, par. "5"; 4a, first complete par.).* Del Re accepted said award (65a, par. "14").

---

*Although the compensation order states that "The employer and the insurance carrier have paid $3,090.00 to the claimant as compensation..." (29a, first complete par.),and directs that "The employer, the Northeast Stevedore, and the insurance carrier, the State Insurance Fund, shall pay to the claimant compensation as follows:", which is then specified, the fact of the matter, however, is that only the carrier paid claimant the said compensation,nor did respondent Prudential Lines in either of the courts below, contend otherwise,nor did either of those courts find otherwise. The reference to both the employer and the carrier in the order is standard language which appears in every compensation order, and reflects the fact that the employer is the one who, in the first instance, is obligated to pay the compensation. 33 U.S.C. section 904. Having paid the compensation benefits, the State Insurance Fund was subrogated to the rights of the employer (5a).

On October 17, 1977*Del Re commenced a personal injury action against Prudential, based on the latter's negligence, in the Supreme Court of the State of New York, County of New York (71a-72a; 43a, third par.; 64a, par. "11"; 16a-17a; 4a, second par.).

Prudential did not respond in any way to the suit, but Del Re did not seek a default judgment (46a, first par.; 16a-17a; 57a-58a, par. "15"; 4a, second par.).

On April 28, 1980, more than six (6) months after Del Re had, on February 25, 1977, accepted compensation under an award in a compensation order made by a deputy commissioner (65a, par. "14"), Del Re commenced an action against Prudential for personal injury damages, on account of the latter's negligence, in the United

*or October 14, 1977

States District Court for the Southern District of New York (34a-38a; 45a, last par.; 64a, par."10", 4a, second par.). The action was brought in the name of Angelo Del Re as plaintiff, seeking damages on his own behalf for injuries sustained in the course of his employment as a stevedore, on May 7, 1975, aboard Prudential's ship, the S.S. Santa Barbara (35a-38a; 4a, second par.).

On June 6, 1980 Prudential filed its answer to the complaint (39a-41a).

In addition to denying the material allegations of the complaint (39a; pars. "1"-"4"), the answer pleaded three complete affirmative defenses (39a-40a, pars. "5"-12"). The first was that the complaint failed to state a cause of action upon which relief could be granted (39a, par."5").

The second was that the action was "time barred pursuant to the doctrine of laches" (40a, pars. "6"-"10").

The third was that plaintiff's injury, if any, was the sole result of his own negligence, or of the negligence of his employer, Northeast Stevedoring Co., in failing to properly supervise Del Re, and that there was no negligence on the part of Prudential (40a, pars. "11"-"12").

After Prudential filed its answer to the complaint, it moved to dismiss the action on the ground of laches and Del Re's failure to bring the suit within six (6) months after his receipt of the award under the Department of Labor order (which was dated February 25, 1977, and filed the same day; 27a-31a), as required by 33(b) of the Longshoremen's Harbor and Workers' Compensation Act, 33 U.S.C., section 933(b)

(15a; 4a, third par., 43a, first par.).*

With respect to the motion in branch to dismiss on the ground of laches, District Court Judge Sand decided that the issue of laches could best be decided after trial, and denied that branch of the motion without prejudice to renewal at the close of the trial (15a-16a; 17a, last par.; 4a, last par.).

With respect to the motion in

*As stated in the Appendix which forms a separate volume (42a, footnote), Prudential's notice of motion and moving papers were not included in the Joint Appendix filed with the Court of Appeals on Prudential's appeal to that Court, which resulted in the judgment sought to be reviewed in this Court. The headings in the Appendix indicating that Del Re's opposing affidavit and Prudential's reply affidavit were filed in connection with a motion made by Prudential to dismiss the complaint "for laches" (only) are incomplete in that they should have added that the motion was also based on Del Re's failure to bring the action within the prescribed 6-month period (33 U.S.C., section 933(b)).

branch to dismiss on the ground of Del Re's failure to bring the suit within the prescribed 6-month period, Judge Sand, in view of Prudential's inability at that time to show when the award in the compensation order was filed or when any settlement (embodied in an order) was agreed to by the parties, denied that branch of the motion without prejudice to renewal (17a, last par., to be read with 4a, last par.).

Finally, Judge Sand ordered Del Re to elect whether he intended to seek a default judgment in the state court action, or to litigate the federal court action (17a, first complete par.; 4a-5a).

Thereafter the state court action was discontinued, but the discontinuance was not "with prejudice" (67, par. "1"; affirmation of Howard Fishker, an attorney associated with the attorneys

for Del Re, dated May 18, 1981, submitted on behalf of Del Re in opposition to Prudential's renewed motion to dismiss the complaint, a motion we deal with subsequently herein; see, also, 4a-5a).

While Prudential, in an affidavit by its attorney, John F. McHugh, submitted in support of Prudential's renewed motion to dismiss the complaint (a motion which, as we have said, we deal with subsequently herein), alleged that the discontinuance of the state court action was "with prejudice", and further stated that a copy of the document evidencing said discontinuance was filed in the state court, and was attached to Mr. McHugh's affidavit as Exhibit "D" (65a, par. "12"), that claim that the discontinuance was "with prejudice" was subsequently abandoned by Prudential, as evidenced by the following facts: Not only was the document allegedly demonstrating

that the discontinuance was "with prejudice" not included in the Joint Appendix filed in the Court of Appeals on Prudential's appeal to that court, which resulted in the judgment sought to be reviewed, but in its principal brief in that court, Prudential's only reference to the discontinuance is devoid of any claim that it was with prejudice, consisting, as that reference does, only of the statement,

> "On March 4, 1981, plaintiff voluntarily discontinued his State Supreme Court action (A-48) and therefore the only pending action is the instant one" (brief, p. 3, third par., concluding sentence).

Moreover, Prudential, in its reply brief in the Court of Appeals, in its "chronology of significant events" in the case, states, in item "(7) merely the following:

"Stipulation discontinuing state court suit: February 27, 1981 (A-48)" (reply brief, pp. 1-2).

Furthermore, Prudential, in its principal brief in the Court of Appeals (the only brief in which it set forth the "Issues" presented by the appeal), did not list as an issue the question whether the federal court action was barred because the state court action had, as Prudential had originally, but mistakenly, contended, been discontinued with prejudice.

Finally, neither of the courts below treated the federal court action as barred because the state court action had, as Prudential had originally, but mistakenly, contended, been discontinued with prejudice.

PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT ON THE GROUND THAT DEL RE HAD NO STANDING TO COMMENCE OR MAINTAIN THE ACTION

On or about May 7, 1971, Prudential, having obtained copies of Del Re's compensation records, which showed, among other things, the date when he accepted compensation under an award in a compensation order filed by a deputy commissioner (namely, February 25, 1977; 31a*), renewed its motion to dismiss the complaint on the ground that Del Re had no standing to commence or maintain the federal court action (which had been instituted on April 28, 1980; 34a-38a, 45a, last par., 64a, par. "10"; 4a, second par.), because he had failed, although required so to do, to bring the action within six (6) months of February 25, 1977 (61a-66a).

*to be read with 27a-30a

DEL RE'S OPPOSITION TO PRUDENTIAL'S RENEWED MOTION TO DISMISS, AND THE BASIS THEREOF: NAMELY, (1) THE LETTER FROM THE COMPENSATION CARRIER FOR DEL RE'S EMPLOYER, (a) RATIFYING THE COMMENCEMENT AND CONTINUATION OF THE ACTION, AND (b) REASSIGNING TO DEL RE THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DEL RE'S PERSONAL INJURY DAMAGES,* AND (2) DEL RE'S ACCEPTANCE OF THE RATIFICATION AND REASSIGNMENT, AND THE OTHER TERMS AND PROVISIONS**

Del Re opposed Prudential's motion on the ground that he did have standing to commence and maintain the action, predicating that claim on a letter written by his employer's compensation carrier, the State Insurance Fund, to his attorneys, subsequent to the commencement of the action, which letter was attached to his counsel's affirmation (69a-70a, to be read with 67a-68a), and which we summarize in a moment.

The carrier, the State Insurance Fund, was the assignee, by operation of law, of Del Re's right to sue the ship-

* AND CONTAINING CERTAIN UNDERTAKINGS BY THE CARRIER, ETC.

**OF THE LETTER

owner, because of the two related facts (1) that it had been subrogated to the rights of Del Re's employer, the stevedore, by virtue of the fact that it had paid the compensation benefits to Del Re (see pp. 6-7 supra, and 33 U.S.C., section 933(h)*), and (2) prior to the commencement of the action six (6) months had elapsed since Del Re's acceptance of an award in a compensation order made by a deputy commissioner.** 33 U.S.C., section 933(b); Rodriquez v. Compass Shipping Co. Ltd., _____ U.S. _____, 101 S. Ct. 1945, supra.*

In its letter to Del Re's attorneys, dated May 12, 1981, the State Insurance Fund (69a-70a) stated that it was "the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc.," Del Re's employer on May 7, 1975, the date Del Re was injured while working aboard a vessel owned

*also 5a and 20a (second par.)
** See p. 8, supra.

by Prudential Lines Inc. (69a, first par.).

The State Insurance Fund went on to say that it ratified Del Re's commencement and continuance of his action against Prudential Lines, and that if its ratification was sufficient to preserve to Del Re ownership of the cause of action - plainly indicating its intention, first, to ratify the action, and then immediately following, to reassign to Del Re the cause of action against the shipowner for Del Re's injuries, previously assigned to it by operation of law - it would not institute a separate action against Prudential, but, instead, would be bound by any judgment in the action insofar as it determined liability, or lack thereof, for the accident, and the amount of damages recoverable, if any, as well as by any release executed by Del Re with its approval (69a-70a).

However, the letter continued, insofar as concerned the compensation benefits the State Insurance Fund had paid to Del Re, the Fund

would have a lien and credit rights for same, which would attach to the proceeds of any recovery in the action by way of judgment or settlement, and that said lien and credit rights were not in any way released or extinguished (70a).

In sum, the State Insurance Fund in effect pledged to Prudential* the protection of not having to face a separate action by the Fund, and the benefit of any judgment in the action determining the issues of liability and damages, if any, being res judicata as to the Fund.

Del Re not only accepted, but also relied upon, the carrier's ratification of the commencement and continuation

*albeit somewhat circuitously, making the pledge, as it did, to Del Re's attorneys

of his action, and reassignment to him of the cause of action alleged in the complaint for personal injury damages against the shipowner, doing so six (6) days after the Fund had sent its letter - more particularly, on May 18, 1981 - when his attorneys, in opposition to Prudential's renewed motion, submitted (1) the Fund's letter of ratification, reassignment, etc., addressed to Del Re's attorneys, dated May 12, 1971 (69a-70a), and (2) an affirmation by one Howard Fishkin, an attorney associated with Del Re's attorneys, in which Mr. Fishkin relied upon said letter as being sufficient to defeat Prudential's motion (67a-68a).

THE DISTRICT COURT'S DENIAL, IN AN OPINION, OF PRUDENTIAL'S RENEWED MOTION TO DISMISS THE COMPLAINT

On June 18, 1981 Judge Sand denied Prudential's motion to dismiss the complaint, doing so in an opinion (19a-23a*).

Preliminarily, Judge Sand held that the State Insurance Fund, Del Re's employer's compensation carrier on the day of the accident (69a, first par.), had been subrogated to all rights of Del Re's employer, pursuant to 33 U.S.C., section 933(h) (20a, second complete par.). That holding was compelled by the fact that Del Re's compensation records, which were attached to Prudential's moving affi-

*The heading in the Appendix for each page of the opinion erroneously states that the opinion, which is dated June 18, 1981, was filed on January 19, 1981 (19a-23a). The opinion was filed on June 19, 1981, as indicated directly below the caption of the case at the first page of the opinion (19a).

davit, made by John F. McHugh, its counsel, as Exhibit "E" (64a, par. "7", to be read with 65a, par. "14"), disclosed that the State Insurance Fund had paid the compensation benefits to Del Re (27a-31a; see, also, pp. 6-7, supra).

Judge Sand held that the carrier's ratification conferred standing upon Del Re to continue and maintain the action (19a-23a) (but - and here we add our own gloss - for the benefit, of course, of the carrier, as the real party in interest, subject to the provisions of 33 U.S.C. section 933(e) respecting the distribution of the proceeds of any recovery in the action, in the absence, of course, of an agreement between the carrier and the longshoreman covering the same subject matter).

Judge Sand also appears to have

held, albeit somewhat elliptically and obliquely, that the carrier's letter to Del Re's attorneys, to which he referred in some detail, also amounted to a reassignment by the carrier to Del Re of the cause of action against the shipowner (21a, 22); see also pp. 34-36, 38-42, infra.

In reaching the conclusion that the carrier's ratification conferred standing upon Del Re to continue and maintain the action Judge Sand relied upon "a number of decisions in this district rendered after the Court of Appeals decision in Rodriguez, 617 F. 2d 955 (2d Cir., 1980), but prior to the Supreme Court's affirmance*, upholding the efficacy of such a ratification" (20a, last, but incomplete, par.), referring to the ratification by the car-

*_____ U.S. _____, 101 S Ct. 1945 (May 18, 1981)

rier in this case, dealt with by Judge Sand in the preceding paragraph (20a, second complete par.).

In Rodriguez v. Compass Shipping Co., supra (2 Cir., May 19, 1980), 617 F. 2d 955, involving facts virtually identical to those at bar, the Court of Appeals, at 958 (section "(2)" of the opinion), in effect held - and the holding was essential to its decision in the case - that had the statutory assignee of the cause of action against the shipowner for the longshoreman's personal injury damages (in that case the employer; sec. 33 U.S.C., section 933(b), but see "(h")" for compensation carrier as the statutory assignee) ratified, as the real party in interest, the commencement of the action brought by the longshoreman, in his own name, after the expiration of the prescribed 6-month period (33 U.S.C., section

933(b)), the ratification would have conferred standing upon the longshoreman to continue and maintain the action (but - and here we again add our own gloss - for the benefit, of course, of the statutory assignee, the employer in that case, and the real party in interest, subject, of course, to the provisions of 33 U.S.C., section 933(b), respecting the distribution of the proceeds of any successful recovery in the action, in the absence, of course, of an agreement between the carrier and longshoreman covering the same subject matter).

The precise context in which the Court of Appeals holding was rendered is as follows (p. 958 of 617 F. 2d, at section "(2)" of the opinion):

> "The defense raised by the defendants, that plaintiff is not the real party in interest,

may always be invoked pursuant to F.R. Civ. P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. United Federation of Postal Clerks v. Watson, 133 U.S. App. D.C. 176, 184 & n. 34, 409 F. 2d 462, 470 & n. 34 (D.C. Cir.), cert. denied, 396 U.S. 902, 90 S Ct. 212, 24 L. Ed. 2d 178 (1969).* A person, such as the employer here, to whom a claim has been assigned under section 33(b), is the real party in interest. Aetna Life Ins. Co. v. Moses, 287 U.S. 530, 53 S Ct. 231, 77 L. Ed. 477 (1933); Moore v. Hechinger, 75 U.S. App. D.C. 391, 127 F. 2d 746 (D.C.Cir. 1942). Assuming the assignment here to be valid, the right to

*Compare the agreement by the carrier in the case at bar, made by it at the time it ratified the commencement and continuation of Del Re's action, that it would not institute a separate action against Prudential, but, instead, would be bound by any judgment which might be rendered in the action determining the issues of liability and the amount of damages, if any, as well as by any release executed by Del Re with its consent, the carrier exacting, in exchange, only a lien and credit rights on the proceeds of any recovery in the action by way of judgment or settlement, to attach to said proceeds (69a-70a).

sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable time to do so.* The defense of assignment therefore is properly asserted as a procedural matter by the defendants." (Underscoring supplied).

From all the foregoing it is abundantly clear, we submit, first, that the Court of Appeals in effect held that had the statutory assignee of the cause of action (in that case the employer) ratified, as the real party in interest, the commencement of the action brought by the longshoreman, in his own name, after the expiration of the prescribed 6-month

*Rule 17(a) provides that "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

period, the ratification would have conferred standing upon the longshoreman to continue and maintain the action (but - and here we add our own gloss - for the benefit of the carrier, the real party in interest, subject, of course, to the provisions of 33 U.S.C., section 933(e), respecting the distribution of the proceeds of any recovery in the action, in the absence, of course, of an agreement between the carrier and the longshoreman covering the same subject matter).

Secondly, it is also clear from all the foregoing that the holding referred to was and is essential to the decision in the case, which affirmed the dismissal of the action.

The holding aforesaid in Rodriguez, supra, 617 F. 2d 955, 958 (at "(2)") was handed down on March 19, 1980. The

ratification by the carrier in this case - given in obvious reliance on the holding - took place on May 12, 1981, fourteen (14) months later (69a-70a).

We turn now to the decisions, cited by Del Re's attorneys to Judge Sand, rendered in the Southern District of New York, where Judge Sand sat, "after the Court of Appeals decision in Rodriguez, 617 F. 2d 955 (2d Cir., 1980), but prior to the Supreme Court's affirmance, upholding the efficacy of such a ratification" (20a, last, but incomplete par.), referring to the ratification in the case at bar (20a, second complete par.).

MOTTA V. RESOURCE SHIPPING AND ENTERPRISES CO. (D.C. S.D. N.Y., OCT. 1980; TENNEY, J.), 499 F. SUPP 1365-1377, ONE OF THE CASES RELIED UPON BY JUDGE SAND IN THE DISTRICT COURT, INVOLVING THE SAME CARRIER AS IN THE CASE AT BAR, AND A LETTER OF RATIFICATION, ETC. VIRTUALLY IDENTICAL TO THE ONE IN THE CASE AT BAR

One of the cases relied upon by Judge Sand in support of his conclusion that the ratification by the carrier, as the real party in interest, of the commencement and continuation of Del Re's action, pursuant to Rule 17(a), was sufficient to confer standing upon Del Re to continue and maintain the action, was Motta v. Resource Shipping and Enterprises Co. (D.C. S.D. N.Y. N.Y., 1980; Tenney, D. J.), 499 F. Supp. 1365 (20a, last, but incomplete par. - 21a), in which the carrier, as in the case at bar, was the State Insurance Fund, and the ratification by the

Fund, as in the case at bar, was embodied in a letter to the plaintiff-longshoreman's counsel, which was virtually identical to the letter in the case at bar (cf. 1368 and 69a-70a).

In Motta, supra, Judge Tenney took the position with respect to the ratification holding in Rodriguez v. Compass Shipping Co. (2 Cir., March 19, 1980), supra, 617 F. 2d 955, 958 (at "(2)"), aff'd. on other grounds, _____ U.S. _____, 101 S Ct. 1945, 1955, discussed at pp. 25-30 supra, that since the question of ratification was, as he concluded, not directly before the Court of Appeals, the holding did not possess precedential value, but was nevertheless entitled to "due respect", 499 F. Supp. 1365, at pp. 1367-1368, 1368 (at "2") - 1369.*

*Petitioner Del Re, for the reasons set forth at pp. 25-30 supra, takes the position that the ratification holding in Rodriguez, supra, 617 F.2d, 955, 958, does possess precedential value, since it was essential to the decision in that case, and indeed forms an integral part of that decision.

Judge Tenney then embarked on a 19-page comprehensive and exhaustive, carefully and closely reasoned, exposition of the law of ratification, collecting and reviewing the authorities and concluding that the ratification in the case before him - which, we repeat, was given by the same carrier as in the case at bar, and in a letter virtually identical to the one at bar (cf. 1368 and 69a-70a) - was sufficient to confer standing upon Motta, pursuant to Rule 17(a), to continue and maintain the action.

Because of the comprehensive and exhaustive nature of the opinion, and its closely reasoned character, the usual summary and/or selected extracts would, we respectfully submit, not fairly and accurately convey the overwhelming impact of its irresistible logic, and would do the opinion an egregious disservice. Accord-

ingly, we refrain from submitting a digest of the opinion or employing selected portions therefrom, but respectfully suggest that the opinion should be read in its entirety.

JUDGE SAND'S APPARENT CONCLUSION, ALBEIT SOMEWHAT ELLIPTICALLY AND OBLIQUELY EXPRESSED, THAT THE CARRIER'S LETTER IN THIS CASE ALSO AMOUNTED TO A REASSIGNMENT BY THE CARRIER TO DEL RE OF THE CAUSE OF ACTION AGAINST PRUDENTIAL FOR DEL RE'S PERSONAL INJURY DAMAGES

Judge Sand appears to have held, but somewhat elliptically and obliquely, that the State Insurance Fund's letter to Del Re's attorneys (69a-70a), besides constituting a ratification by the Fund of the commencement of Del Re's action, pursuant to Rule 17(a), was also a reassignment by the Fund to Del Re of the cause of action against Prudential for Del Re's personal injury damages (20a, from last, but incomplete par. - 21a). See, also, pp.34-36, 38-40, infra.

In reaching that conclusion, Judge Sand appears to have relied, albeit sub silentio, first, upon that portion of the Fund's letter which states that "If ratification is sufficient to preserve to plaintiff-claimant (Del Re) ownership of the cause of action" (69a), it will not institute a separate action against Prudential, but, instead, will be bound by any judgment in the action determining the issues of liability and the amount of damages, as well as by any release executed by Del Re with its approval, and that the Fund has a lien and credit rights for the compensation benefits paid by it, on the proceeds of any recovery in the action by judgment or settlement (69a-70a).

Secondly, Judge Sand expressly relied upon Caldwell v. Ogden Sea Transport Inc. (4 Cir., 1980), 618 F. 2d 1037,

1047-1048 (at "IV") (20a, from last, but incomplete par. - 21a), holding that an actual reassignment to a longshoreman or other harbor worker by a statutory assignee of a cause of action against a third party (such as a shipowner) for the longshoreman's or harbor worker's personal injury damages (the assignee achieving this status perforce 33 U.S.C., section 933(b) or (h)),would be effective to revest the cause of action in the longshoreman or other harbor worker.

Upon the basis of all the foregoing considerations the District Court denied Prudential's renewed motion to dismiss the action, made on the ground of Del Re's alleged lack of standing to commence it and maintain it (28a).

THE DISTRICT COURT'S AMENDED ORDER AND OPINION, PURSUANT TO 28 U.S.C., SECTION 1292(b), CERTIFYING THE QUESTION OF THE EFFECTIVENESS OF THE CARRIER'S RATIFICATION FOR INTERLOCUTORY REVIEW

On July 7, 1981, the District Court, pursuant to 28 U.S.C., section 1292(b), certified for interlocutory review the question "whether a longshoreman's personal injury claim commenced within the period of the statute of limitations but more than six (6) months after receipt of compensation benefits may be maintained pursuant to F.R. Civ. P. 17(a), where the Longshoremen's Act Insurer of plaintiff's employer (as to whom the statute of limitations would bar an independent action) ratifies plaintiff's suit" (25a, to be read with 24a).

THE DECISION OF THE COURT OF APPEALS ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE, REVERSING THE DISTRICT COURT AND REMANDING WITH DIRECTIONS TO DISMISS THE COMPLAINT

On January 21, 1982, the Court of Appeals, in an opinion and accompanying judgment, answered the certified question in the negative, reversed the District Court, and remanded the case to that court with directions to dismiss the complaint (13a, to be read with 1a-12a; 32a-33a).

The opinion is reported at 669 F. 2d 93.

Initially, it should be noted that despite the fact that (a) the carrier's letter to Del Re's attorneys was susceptible of the construction that the carrier not only ratified the commencement of the action, but, at the same time, also reassigned the cause of action against Prudential to Del Re (the letter states that "If our ratifica-

tion is sufficient to preserve to plaintiff-claimant ownership of the cause of action", the carrier will not institute a separate action against Prudential, but will be bound by any judgment in the action determining the issue of liability and the amount of damages, if any, etc., etc., 69a-70a), (b) the District Court also appears to have reached a similar conclusion, although its finding concerning reassignment of the cause of action is somewhat elliptical and oblique in character (20a, from last, but incomplete, par. -21a), (c) Prudential's brief in the Court of Appeals presented, as one of the issues in the case, the question whether the carrier validly reassigned the cause of action* (brief, p. 2, question "2"), and presented arguments on the question, against the validity of the reassignment;(brief, POINT I, pp. 6, 7, 8, 9, 10-11; POINT II, pp. 11,

*to Del Re; respondent contended that the carrier had done so

12, 13; POINT III, pp. 14, 15), and (d) Del Re, in his brief in the same court, while initially contending that the carrier did not reassign the cause of action to Del Re (brief, POINT III, p. 11), nevertheless, immediately following, urged that reassignment by the statutory assignee to the longshoreman or other harbor worker of a cause of action against a third party for the longshoreman's or other harbor worker's personal injury damages was proper, valid and effective (brief, pp. 11-14) - notwithstanding the foregoing facts, the Court of Appeals, in its opinion, made no reference to the question of reassignment or its effectiveness (1a-13a).

While it is true that the District Court did not certify for interlocutory review the question of the reassignment and its effectiveness, nevertheless, that fact did not prevent the Court of

Appeals from considering and deciding the question. 7B Moore's Federal Practice (Second Ed., 1981), section 1292, p. JC-421); Yamamoto v. Omiya, (9 Cir., 1977), 564 F. 2d 1319, 1325 ("IV", "(7-9)", first par.).

With respect to the question whether ratification of the commencement of Del Re's action by the State Insurance Fund (the statutory assignee of Del Re's cause of action against Prudential; 33 U.S.C., section 933(b)(h), and the real party in interest) could confer standing upon Del Re to continue and maintain the action, pursuant to Rule 17a (but, of course, for the benefit of the Fund, as the real party in interest), the Court of Appeals, while ruling that the Fund could not ratify the commencement of the action, did not, however, (a) make any reference to its previous holding in Rodriquez v.

Compass Shipping Co. (March 19, 1980), 617 F. 2d 955, 958 (at "(2)"), a case involving facts virtually identical to those at bar, and discussed at pp. 25-30, supra - a holding necessary to the decision in that case - that ratification by the statutory assignee of the longshoreman's cause of action against the shipowner (in that case the longshoreman's employer) would have conferred standing upon the longshoreman, pursuant to Rule 17a, to continue and maintain the action, let alone (b) attempt to reconcile its decision in the case at bar with its decision in Rodriquez, supra. The Court of Appeals, in the case at bar, was, we respectfully submit, bound to follow its decision in Rodriquez, supra (1a-13a). United States v. Olivares-Vegas (2 Cir., 1974), 495 F. 2d 827, 829 (at "(1)", first par.).

Not only is the decision of the Court of Appeals in this case in conflict

with its decision in Rodriquez, supra, but the reasons it relies upon in its opinion in this case to support its conclusion that the ratification by the carrier is ineffective to confer standing upon Del Re to continue and maintain the action, are, we respectfully submit, shown to be without persuasive force upon examination of the decision and opinion in Motta v. Resource Shipping & Enterprises Co. (D.C. S.D. N.Y., 1980; Tenney, D.J.), 499 F. Supp. 1365, an action in which the carrier was, as in the case at bar, the State Insurance Fund, and the letter of ratification, etc. from the Fund to Motta's attorney was, in all material and essential particulars, identical to the letter of ratification from the Fund to Del Re's attorneys (cf 136 and 69a-70a).

Judge Tenney, in Motta, supra, went directly to the heart of the matter

when ,quoting from the notes of the Advisory Committee, Fed. R. Civ. P. 17(a), 1966 Amendment, he wrote (at p. 1371, rt. hd. col., at "(5-7"), first par.):

> "The purpose of the real party in interest rule is 'to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata' .. ... A letter or document that ratifies the commencement and continuation of an action may be sufficient to cure any real party in interest defects in the suit. de Uries v. Weinstein Int'l, Corp., 80 F.R.D. 452, 459 C.D. Minn. 1978); Clarkson Co. v. Rockwell Int'l. Corp., 441 F. Supp. 792, 797-98 (N.D. Cal. 1977); Wright & Miller, Federal Practice and Procedure: Civil section 1555, at 709. The district court has discretionary authority to determine whether ratification is appropriate in a given case. James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (N.D. Miss. 1977); Southern Nat'l. Bank of Houston v. Tri Financial Corp., 317 F. Supp. 1173, 1188 (S.D. Texas 1970). This discretion must be exercised in a manner

consistent with the Rule's purpose to protect the defendant from subsequent litigation and to finally resolve the dispute at hand. See James v. Nashville Bridge Co., supra, 74 F.R.D. at 597; Prudential Lines Inc. v. General Tire Int'l. Co., 74 F.R.D. 474, 476 (S.D. N.Y. 1977)."

The letter of ratification submitted in that case states that The State Insurance Fund, Northeast's insurance company and the real party in interest, ratifies Motta's commencement and continuance of the suit.* The insurance company agrees to be bound by any judgment rendered in the action that determines liability and damages. Furthermore, it recognizes that it would be bound by any release Motta executed with the insurance company's approval. It also asserts that it will not institute a separate action against Resource. The State Insurance Fund expressly reserves its lien and credit rights and states that they will "attach to the proceeds" "resulting

*See letter at p. 1368 of 499 F. Supp.

from any recovery by way of judgment or settlement".

The letter in the case at bar is, in all essential particulars, identical to the one in Motta. And, as in Motta, it manifestly serves "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata". Notes of Advisory Committee, Fed. R. Civ. P. 17(a), 1966 Amendment.

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The court of first instance in this case was and is the United States District Court for the Southern District of New York (34a, 35a-38a, 39a-45a, 4a, second complete par., 19a-23a, 24a-25a,

26a). That court had (and still has) original jurisdiction of the action perforce the provisions of 28 U.S.C., section 1332(a)(2)(3)(c), for these reasons:

(1) The action is a civil one (35a-38a).

(2) The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs (35a, par. "IV").

(3) At the time of the commencement of the action, the action was (and still is) between a non-citizen, plaintiff Angelo Del Re (petitioner herein) (35a, par. "III"), and a citizen of the State of New York: namely, defendant Prudential Lines, Inc., a citizen of said State because of being a domestic corporation - that is, a corporation incorporated in the State of New York (35a, par. "I") - and also because of being a corporation

having its principal place of business in the Borough of Manhattan, City of New York (35a, par. "II"), which is in the State of New York.

REASONS FOR GRANTING CERTIORARI

The extraordinary importance and unsettled nature of the basic questions presented for review

After this Court, in Rodriguez v. Compass Shipping Co. (May 18, 1981), _____ U.S. _____, 101 S Ct. 1945, had decided that the statutory assignee (in that case the employer) of a longshoreman's cause of action for personal injury damages against a negligent third party (in that case a shipowner) - to whom the cause of action had been assigned because the longshoreman had failed to bring such action within the 6-month period prescribed by 33 U.S.C., section 933(b) for doing so - (a) could not be

required either to pursue the third-party claim (101 S Ct., at p. 1950, rt. hd. col.), nor to reassign the cause of action to the longshoreman (id., at p. 1950, rt. hd. col., first complete par., pp. 1955-1956, "III"), since, among other reasons, the statutory assignee has exclusive control of the cause of action (101 S Ct., at p. 1955, left hd. col., carry-over paragraph from p. 1954; p. 1949, left hd. col.), it was only natural, indeed inevitable, that the day would soon come when this Court would be asked, as the instant petition does, to decide whether that exclusive control permits the statutory assignee, where the longshoreman has brought an action against the shipowner after the expiration of the 6-month period prescribed for doing so, voluntarily either to ratify, as the real party in interest, pursuant to F.R. Civ. P. 17(a), the commencement of the action, or to reassign

the cause of action to the longshoreman, or both, as in the case at bar (ratification; 68a-70a; reassignment; pp. 19, 23-24, 34-36, 38-42, supra; 69a-70a, 21a*

That the Court would one day be asked to resolve said question or questions was to be expected in view of the fact that those questions, which daily recur in litigation in both federal and state courts throughout the country (see, e.g., the case at bar, Motta v. Resource Shipping & Enterprises Co. (D.C. S.D. N.Y., Tenney, D.J., Oct. 22, 1980), 499 F.Supp. 1365, and illustrative state court cases (20a-21a), relied upon by the District Court in the case at bar in upholding ratification by the carrier, who had been subrogated to the employer's rights, by virtue of its payment of the compensation benefits, 33 U.S.C., section 933(h), to be read with "(b)"; see 20a, second complete par., and 20a-21a)), these questions are of incalculable importance, as well as immediate

*See Caldwell v. Ogden Sea Transport, Inc. (4th Cir. 1980), 618 F. 2d 1037, 1047-1048.

and pressing urgency, to the hundreds of shipping companies, the hundreds of stevedoring companies, the hundreds of compensation carriers for the latter companies, and the tens of thousands of longshoreman, all engaged in the various aspects of maritime transportation of cargo throughout not only the country, but indeed the world, and finally/of importance to the courts, both federal and state, as well as the legal profession throughout the country, which grapple with said recurrent questions on virtually a daily basis.

In light of the foregoing facts, which conclusively demonstrate the towering importance of the questions, their endlessly recurrent nature, and their unsettled character and status, certiorari, it is respectfully submitted, should be granted to resolve them.

The conflict between the Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York

With respect to the question whether the statutory assignee of the cause of action against a negligent shipowner for a longshoreman's personal injury damages, may, where the longshoreman has brought such an action after the expiration of the 6-month period prescribed for doing so, effectively, as the real party in interest, pursuant to F.R. Civ. P. 17(a), ratify the commencement of said action, there is a direct conflict between, on the one hand, the decision of the Court of Appeals for the Second Circuit in this case(1a-13a, 669 F. 2d 93), holding that such ratification by the carrier is without force or effect, and, on the other hand, a recent decision of the United States District Court for

the Southern District of New York, sustaining such ratification, Motta v. Resource Shipping & Enterprises Co. (Oct. 22, 1980; Tenney, D.C.), supra, 499 F. Supp. 1365, relied upon by the District Court in the case at bar (20a-21a), involving facts virtually identical to those in the case at bar, including the fact that the carrier in that case and the carrier in the case at bar are the same: namely, the State Insurance Fund (cf. 499 F. Supp., p. 1368 and 69a-70), and the letter of ratification, etc. in that case from the Fund to Motta's attorney is, in all material and essential respects, identical with the letter in this case from the Fund to Del Re's attorneys (cf. 499 F. Supp., 1368 and 69a-70a).

We have, supra, at pp. 31-34, briefly discussed the salient features of

the decision and opinion in Motta v. Resource Shipping and Enterprises Co., supra, 449 F. Supp. 1365-1377. We would add only - and we say this with the utmost deference due the Court of Appeals for the Second Circuit - that in our view the Motta opinion is a more comprehensive and better reasoned analysis of the subject of ratification, and its application to the very kind of ratification which was and is involved in both Motta, supra, and the case at bar.

Moreover, the efficacy of "such a ratification" was, as the District Court noted in the case at bar (20a-21a), also upheld in De Luzio v. Trans-American Trailer, Inc., Supreme Court of the State of New York, County of New York, County Clerk's #12339/80 (Altman, J.), and Sucino v. Akron Shipping Co., Supreme Court of the State of New York, County of New York, County Clerk's #13029/80 (Wallach, J.).* The District Court

*These decisions appear not to have been reported.

in the case at bar, in upholding ratification by the carrier, also relied upon said decisions.

In view of the transcendental importance of the ratification question, its recurrent nature, and its unsettled character and status, certiorari, it is respectfully submitted, should be granted, to resolve the conflict between the Court of Appeals for the Second Circuit in this case and the United States District Court for the Southern District of New York in Motta v. Resource Shipping & Enterprises Co., supra, 499 F. Supp. 1365.

(a) The intra-circuit conflict in the Court of Appeals for the Second Circuit between the decision in this case and one of the holdings in Rodriquez v. Compass Shipping Co.(March 19,1980), 617 F.2d 95, 98 (at "(2)") affd. on other grounds,_____ U.S. _____, 101 S Ct. 1945

(b) The reliance of the carrier and petitioner upon the holding in Rodriquez, supra

In Rodriquez v. Compass Shipping

Co. (March 19, 1980), 617 F. 2d 95, 98 (at "(2)"), affd. _____ U.S. _____ 101 S Ct. 1945, a case involving facts virtually identical to those in the case at bar, the Court of Appeals for the Second Circuit, on March 19, 1980, in a decision by a panel consisting of Circuit Judges Waterman, Moore and Mansfield, one year and ten (10) months prior to the decision in the case at bar, on January 21, 1982, by another panel of the same court, consisting of Circuit Judges Lumbard, Mansfield and Newman, as shown more fully at pp. 25-30, supra, had, at 617 F. 2d 95, 98 (at "(2)"), held - and, as we see in a moment, the holding was essential to, and an integral part of, the decision in Rodriquez, supra - that where the longshoreman had brought an action for personal injury damages against a negligent shipowner after the expiration of the 6-month period prescribed for doing so (33

U.S.C., section 933(b)), the longshoreman would have had standing to continue and maintain the action, for the benefit of the assignee, as the real party in interest,* if the assignee had, pursuant to F.R. Civ. P. 17(a), ratified the commencement of the action. Rodriquez, supra, 617 F. 2d, at p. 958 (at "(2)"). See pp. 25-30, for exposition in full of the foregoing holding and the fact that the holding was essential to, and an integral part of, the decision in that case.

One year and ten (10) months later, however, in the case at bar, in which the facts are virtually identical to the facts in Rodriquez, supra, the same court, albeit by a different panel, held

*subject, of course, to the provisions of 33 U.S.C., section 933(e), governing the distribution of the proceeds of any recovery in the action.

that ratification by the statutory assignee (in this case the carrier) of the longshoreman's untimely and barred action, was without force or effect. In so doing, however, the court made no reference to the holding in Rodriquez, supra, described above, concerning ratification.

That same court, however, had previously held, in United States v. Olivares-Vega (1974), 495 F. 2d 827, at 829 (at "(1)", first par.), that

> "We are, of course, bound by the decisions of this circuit unless they can be distinguished from the facts of this case...."

The material and essential facts of the case at bar, however, we submit, cannot be distinguished from the similar facts in Rodriquez, supra. Indeed, the essential and material facts in both cases are virtually identical.

The ratification by the carrier in this case took place on May 12, 1981 (69a-70a), fourteen (14) months after the ratification holding in Rodriquez, supra, on March 19, 1980, and in obvious reliance thereon. Petitioner, in accepting the ratification, as he did (67a-68a), also manifestly relied upon the Rodriquez holding.

That such reliance was to be expected is evident from the case of Motta v. Resource Shipping & Enterprises Co., supra (D.C. S.D. N.Y., Oct. 22, 1980; Tenney, D.J.), 499 F. Supp. 1365, involving the same carrier as in the case at bar, the State Insurance Fund (cf. 69a-70a and 499 F. Supp., at p. 1368), and a letter of ratification, etc. from the Fund to Motta's attorney, which, in every material and essential respect, is identical to the letter from the Fund to the attorneys for

petitioner herein (cf. 69a-70a and 449 F. Supp., at p. 1368). In Motta, supra, at p. 1368 (rt. hd. col., to be read with 1367-1368), as Judge Tenney noted, Motta, "(s)eizing on"the holding in Rodriquez, supra, 617 F. 2d, at p. 98 (at "(2)"), quoted in Motta at pp. 1367-1368, of 499 F. Supp., "procured a letter from Northeast's (the stevedore's) insurance company asserting that it ratified the plaintiff's commencement of the action" (p. 1368, rt. hd. col.*).

In view of the recurrent and unsettled nature and status of the question, and its obviously monumental importance,

---

*In Motta, supra, Judge Tenney held that the question of ratification was not directly before the court in Rodriquez, supra, and that, therefore, the holding concerning ratification was not entitled to precedential value, but was nevertheless entitled to "due respect". 499 F. Supp. 1365, at pp. 1368-1369.

and the reliance of the carrier and petitioner upon the Rodriquez ratification holding, certiorari, it is respectfully submitted, should be granted to resolve the intra-circuit conflict described above.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CHEVRON OIL CO. V. HUSON, 404 U.S. 97, AND DENIES PETITIONER AND THE CARRIER THE DUE PROCESS DUE THEM UNDER THE FIFTH AMENDMENT

The facts in support of this point are the same as those set forth at pp. 55-61, supra, concerning the intra-circuit conflict in the Second Circuit Court of Appeals.

The Court of Appeals in this case, in unexpectedly overruling, albeit sub silentio, its prior holding in Rodriquez v. Compass Shipping Co., supra, 617 F. 2d 955, 958 (at "(2)"), affd. on other grounds, _____ U.S. _____, 101 S Ct. 1945

that ratification by the statutory assignee, pursuant to Rule 17(a), of the commencement of an action brought by a longshoreman after the expiration of the 6-month period prescribed for doing so, would confer standing upon the longshoreman to continue and maintain the action - a holding upon which petitioner and the carrier relied - and applying the overruling retroactively in and to the case at bar, acted contrary to Chevron Oil Co. v. Huson (1971), 404 U.S. 97, 106-107, and denied petitioner and the carrier the due process due them under the Fifth Amendment to the Constitution of the United States. See, for parity of reasoning, Brinkerhoff-Faris Co. v. Hill (1930), 281 U.S. 673, as explicated in Mullaney v. Wilbur (1975), 421 U.S. 684, 690, note 10.

IN DECLINING TO GIVE EFFECT TO THE CARRIER'S RATIFICATION AND REASSIGNMENT, AND PETITIONER'S ACCEPTANCE OF SAME, THE COURT OF APPEALS DENIED PETITIONER AND THE CARRIER THE DUE PROCESS PROPERTY RIGHTS DUE THEM UNDER THE FIFTH AMENDMENT

The cause of action against the negligent shipowner in this case for the longshoreman's personal injury damages, of which the carrier was the statutory assignee - that is, the one in whome the cause of action had vested - was and is a property right protected by the Fifth Amendment to the Constitution of the United States. Gibbes v. Zimmerman (1933), 290 U.S. 326, 332.

As statutory assignee, the carrier had exclusive control of the cause of action (Rodriquez v. Compass Shipping Co., supra, _____ U.S. _____, 101 S Ct. 1945, 1955; carry-over par. from 1954), which, as stated, is a property right.

That property right includes the right to exercise control by making any legitimate use or disposal of the thing owned. 16A C.S.S., Constitutional Law, section 599(b), pp. 696-698, and authorities there cited; see, for parity of reasoning, People v. Hawkins (1898), 157 N.Y. 1, 7; Sanderson v. City of Willmar (1968), 282 Minn. 5, 162 N.W. 2nd 494, 497 (at "4"). Ratifying the commencement of Del Re's action and reassigning the cause of action to Del Re represent a legitimate use and disposal of the cause of action.

In failing to give effect to the carrier's ratification and reassignment of the cause of action, and petitioner's acceptance of same, the Court of Appeals, it is respectfully submitted, deprived the carrier of the right to make legitimate use of its property, and petitioner of the right to accept said use for his benefit, and

consequently denied both of them the due process due them under the Fifth Amendment to the Constitution of the United States. Gibbes v. Zimmerman, supra, 290 U.S. 326, 332; People v. Hawkins, supra, 157 N.Y. 1, 7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING B. BUSHLOW
Counsel of record
for petitioner

APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C., section 1332

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the

plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant,

such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, section 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439.

33 U.S.C., section 904

Liability for compensation

(a) Every employer shall be liable for and shall secure the payment

to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the sub-contractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C., section 905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of

section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive

of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C., section 933

Compensation for injuries where third persons are liable

Election of remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of compensation operating as assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Recoveries by assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to --

(A) the expenses

incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compen-

sation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Rule 17(a) of the Federal
Rules of Civil Procedure

Parties Plaintiff and
Defendant; Capacity

Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed

after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.